

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CLAY J. PERINA

Claimant

VS.

CITY OF OVERLAND PARK

Self-Insured Respondent

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Docket No. **1,030,026**

ORDER

Respondent requested review of the May 1, 2007 Award by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on August 7, 2007.

APPEARANCES

Michael R. Wallace of Shawnee Mission, Kansas, appeared for the claimant. Kip A. Kubin of Kansas City, Missouri, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The claimant, a police officer, alleged injury to his left shoulder as he was attempting to fasten his seatbelt in his patrol car. The respondent argued the act of fastening a seat belt is a normal activity of day-to-day living and denied his claim.

The Administrative Law Judge (ALJ) determined that claimant's action in reaching for the seatbelt aggravated a preexisting condition. The ALJ further determined claimant suffered a compensable injury and awarded claimant compensation for a 10 percent scheduled disability to the left shoulder.¹

¹ In the May 1, 2007 Award the permanent partial disability compensation calculation erroneously used a 10 percent whole person "work" disability. A Nunc Pro Tunc, dated May 2, 2007, corrected the compensation paragraph in the May 1, 2007 Award to reflect a 10 percent scheduled disability to the shoulder. Unfortunately, the Nunc Pro Tunc contains an incorrect designation of the "right shoulder" instead of claimant's actual injury to the left shoulder.

Respondent requests review and raises the issue of whether claimant met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment. Respondent argues that claimant's action in fastening his seatbelt was a normal activity of day-to-day living and the fact it occurred at work did not increase the risk of injury. Respondent further argues that the doctor who examined claimant within days of the injury concluded the act of fastening a seatbelt could not have caused the injury claimant suffered. Consequently, respondent argues the ALJ's Award should be reversed and the Board should determine claimant failed to meet his burden of proof that he suffered injury arising out of his employment. The respondent's application for review also raised the issue of the nature and extent of disability but upon receipt of the Nunc Pro Tunc respondent abandoned that issue.

Conversely, claimant requests the Board to affirm the ALJ's determination claimant suffered accidental injury arising out of and in the course of his employment. But claimant argues that his medical expert's opinion should be adopted which would increase the percentage of disability to 14 percent. Claimant further argues the ALJ failed to address his request for reimbursement of medical expenses and mileage in the amount of \$252.84 as well as \$450 in unauthorized medical and requests the Board to order respondent to reimburse claimant for those expenses.

The issues for Board review include:

1. Whether claimant met with personal injury by accident arising out of and in the course of employment.
2. If claimant suffered a compensable injury, the nature and extent of disability.
3. Whether claimant is entitled to reimbursement for medical expenses, mileage and unauthorized medical treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant is a police officer for the City of Overland Park. As part of his job duties he helps train dogs for the K-9 division which includes wearing a bite sleeve on his left arm and acting as a crime suspect. In that capacity he runs from the dog but when it is let loose he turns and uses his left arm for the dog to attack and bite.

On June 7, 2006, claimant got in his patrol car and realized he had not adjusted the seatbelt height for comfort. He then used his left hand to reach back and push the slide up on the post that holds the seatbelt. The claimant felt a pop in his shoulder with an immediate onset of pain. Unlike in his personal vehicle where claimant would make such adjustments with his right hand, the claimant has to use his left hand when on duty because it is difficult to reach across his body with his right hand due to the gear on his belt and his ballistic vest. The placement of his radio on his left side as well as his ammunition magazines simply makes it difficult, if not impossible, to turn and reach across his body with his right hand to adjust or reach the seatbelt.

As a result of the injury, the claimant had an onset of pain and restricted range of motion in his shoulder. Claimant notified respondent and was referred to St. Luke's South Hospital emergency room where he was seen by a doctor and had x-rays taken of his shoulder. Claimant was further referred by respondent to Corporate Care in Lenexa and then Kansas City Orthopedics in Leawood where an MRI was performed. But claimant was then told his claim was denied and any further treatment was his responsibility.

Claimant then sought further treatment with his primary care physician, Dr. Chris Wright who referred claimant to Dr. Brian Kindred. Dr. Kindred recommended surgery but claimant elected not to proceed with the surgery. Claimant occasionally has pain, stiffness and restricted motion in his shoulder when he awakens.

Dr. Roger A. Thomas, board certified in family practice and a physician at Corporate Care, saw claimant on June 8, 2006, for his shoulder problems. Dr. Thomas testified that claimant told him he had injured his shoulder while reaching up with his left hand to grab the seatbelt and pull it down to fasten it. The doctor said claimant told him the onset of pain occurred as he was pulling the seatbelt down. Dr. Thomas diagnosed claimant with a mild case of bicipital tendinitis. And Dr. Thomas noted that the MRI performed on claimant's left shoulder revealed a paralabral cyst as well as a small posterior labral tear. But Dr. Thomas opined that the force necessary to pull down the seatbelt would not have been sufficient to cause the labral tear. And Dr. Thomas further opined that merely flexing the elbow would not have caused the labral tear. On cross-examination, Dr. Thomas agreed that if an individual were pushing up with enough force that could possibly tear the labrum.

Dr. Edward J. Prostic saw claimant on August 23, 2006, at the request of claimant's attorney. The purpose of the visit and examination of claimant was to evaluate claimant's condition. Dr. Prostic took a history from the claimant, reviewed previous medical treatment records and conducted a physical examination of claimant. The doctor diagnosed claimant with a tear of his glenoid labrum and most likely the biceps anchor. Dr. Prostic further opined that claimant's injuries were caused by his employment activities. Dr. Prostic rated claimant with a 14 percent impairment to his left upper extremity. The

doctor noted that the AMA *Guides*² do not address the injuries suffered by claimant. Finally, the doctor opined that claimant will likely require surgical debridement of his glenoid labrum as well as repair of his biceps anchor in the future.

On cross-examination, Dr. Prostic agreed that upon his physical examination he noted the claimant's biceps anchor was intact. And the MRI also indicated the claimant's bicep anchor was intact. And the claimant indicated that the pain from the original injury had decreased, claimant had no loss of strength, claimant was taking no medications, and had no heat, swelling, discoloration or atrophy.

At the request of respondent's counsel, Dr. Robert R. Brown, board certified in family practice, examined claimant on January 22, 2007. Dr. Brown took a history from the claimant, reviewed previous medical treatment records and conducted a physical examination of claimant. Dr. Brown testified claimant provided a history of a pop in his shoulder and onset of pain as he was pulling down on his seatbelt. Dr. Brown diagnosed claimant with a glenoid labral tear of the shoulder. Dr. Brown rated claimant with a 7 percent impairment to his left upper extremity. And although the doctor consulted the AMA *Guides* he noted there was no section that specifically addresses a labral tear so he relied upon his own judgment as well.

Respondent argues that claimant's injury did not "arise out of" his employment because his injury occurred while fastening a seatbelt which is a normal activity of day-to-day living.

Under the Kansas Workers Compensation Act an injury does not "arise out of" employment where the disability is the result of the natural aging process or by the normal activities of day-to-day living.³ An injury is not compensable unless it is fairly traceable to the employment and comes from a hazard which the worker would not have been equally exposed to apart from the employment.⁴ But an injury arises out of employment if the injury is fairly traceable to the employment and comes from a hazard the worker would not have been equally exposed to apart from the employment.⁵

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

³ K.S.A. 2006 Supp. 44-508(e).

⁴ *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, rev. denied 281 Kan. ____ (2006)

⁵ *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 61 P.3d 81 (2002).

Adjusting and fastening an automobile seat belt can undoubtedly be described as an activity of day-to-day living for someone operating an automobile. However, claimant's employment required that he wear gear which restricted his ability to reach across his body with his right hand or twist his body to the left to adjust and pull a seatbelt across his body to be fastened. Instead, the gear his job required him to wear resulted in claimant having to reach up and back with his left hand to adjust and then pull his seatbelt across his body to be fastened. This unique method of reaching backward with his left arm was a hazard that claimant would not have been equally exposed to apart from his work. As he noted, in his personal vehicle he used his right arm to reach across his body to the seatbelt. The claimant has met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment.

The claimant used his left hand to reach back and push the slide up on the post that holds the seatbelt. The claimant felt a pop in his shoulder with an immediate onset of pain. A claimant's testimony alone is sufficient evidence of his own physical condition.⁶ Dr. Prostic opined that claimant's work activity caused his injury. The claimant has met his burden of proof that his activity of reaching back to adjust and pull his seatbelt down caused his shoulder injury.

The Board is mindful that Dr. Thomas opined that the force necessary to pull down a seatbelt would not have been sufficient to cause the labral tear and merely flexing the left elbow would not be sufficient to cause the labral tear. But the doctor agreed that if an individual were pushing up with enough force that could possibly tear the labrum. And the doctor's records contain a history that claimant injured his shoulder while reaching up for his seatbelt and felt a pop and sharp pain. That corroborates claimant's testimony that he heard the pop in his shoulder while reaching back and up to adjust the seatbelt. The fact that pulling the seatbelt down would not, in Dr. Thomas' opinion, have caused the shoulder injury is immaterial as the accident occurred as claimant was reaching up and back to push up on the slide to adjust the seatbelt.

Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the *AMA Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.⁷ Both Drs. Prostic and Brown consulted the *AMA Guides* but agreed that claimant's injury, a labral tear, was not specifically addressed by the *Guides* so they both provided ratings based upon their experience.

⁶ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000).

⁷ K.S.A. 44-510e(a).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁸ The claimant's testimony alone is sufficient evidence of her physical condition.⁹ The ratings ranged from Dr. Prostic's 14 percent to Dr. Brown's 7 percent. The ALJ determined claimant suffered a 10 percent impairment to the left shoulder. The Board agrees and affirms.

The claimant requested reimbursement of medical expenses incurred after respondent denied the claim. At oral argument to the Board, respondent finally conceded that it had no objection to claimant's requests for reimbursement of unauthorized medical as well as the aforementioned medical expenses if the claim is found compensable. Claimant requested reimbursement of medical mileage expenses in the amount of \$202.84 plus \$25 paid to Johnson County Orthopedics and \$25 paid to College Park Family Care Center, PA. Where an employer has knowledge of the injury and refuses to provide the services of a healthcare provider the employee may obtain such services and if the claim is determined compensable the employer shall be liable for the expenses.¹⁰ Respondent is ordered to make the requested reimbursements. Likewise, respondent is ordered to reimburse claimant \$450 for unauthorized medical incurred when he obtained an examination with Dr. Prostic for treatment recommendations.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated May 1, 2007, as modified by his May 2, 2007 Nunc Pro Tunc, is modified to award claimant reimbursement for medical mileage expenses, out of pocket medical expenses and unauthorized medical expenses and affirmed to reflect claimant suffered a 10 percent scheduled disability to the left shoulder.

IT IS SO ORDERED.

⁸ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991), *rev. denied* 249 Kan. 778.

⁹ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001).

¹⁰ K.S.A. 44-510j(h).

Dated this _____ day of September 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge